Petition

81-1211

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In the

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK PURRAZZO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Was the refusal of the trial court to instruct the jury relating to manslaughter violative of petitioner's rights pursuant to the Fifth and Sixth Amendments to the United States Constitution?
2. Did the unsupported insinuations referred to by the prosecution during cross-examination and closing argument deprive petitioner of a fair trial?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

NO.

FRANK PURRAZZO,

Petitioner,

vs.

THE PEOPLE OF THE
STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of Illinois entered on October 19, 1981 denying his Petition for Leave to Appeal.

JUDGMENT AND OPINIONS OF THE COURTS BELOW

The Judgment of the Circuit Court of Cook County, Illinois, was entered on December 18, 1979, without opinion and is not reported. The opinion of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County was filed on April 7, 1981, and is reported at 95 Ill. App.3d 886, 420 N.E.2d 461. A copy of this opinion is set forth in the Appendix. The order of the Supreme Court of Illinois was entered on October 19, 1981, and is not reported.

JURISDICTION

The order of the Supreme Court of Illinois denying leave to appeal was entered on October 19, 1981, and the jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution.

> "No person ... shall ... in any criminal case ... be deprived of life, liberty, or property, without due process of law ..."

Amendment VI, United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

Amendment XIV, United States Constitution.

> "No State shall ... deprive any person of life, liberty, or property, without due process of law ..."

STATUTES INVOLVED

Chapter 38, Section 9-2, Illinois Revised Statutes.

> "(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed ...

* * *

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable."

STATEMENT OF THE CASE

Information No. 78 I 7599, filed by the State's Attorney of Cook County, Illinois, on December 26, 1978, charged the petitioner with two counts of murder of Esperansa Delarosa on December 1, 1978, in violation of Chapter 38, Sections 9-1(a-1) and 9-1(a-2), Illinois Revised Statutes, and one count of armed violence in violation of Chapter 38, Section 33 A-2, Illinois Revised Statutes.

He was found guilty by a jury on October 12, 1979, of the crimes of murder and armed violence. On December 18, 1979, he was sentenced to imprisonment for a period of 20 years.

The opinion filed by the Appellate Court of Illinois contains a sufficient recitation of the facts so that it is not necessary to repeat them here.

REASONS FOR GRANTING THE WRIT

I. Refusal Of The Trial Court To Instruct The Jury Relating To Manslaughter Was Violative Of Petitioner's Rights Pursuant To The Fifth And Sixth Amendments To The United States Constitution.

The trial judge erroneously refused to give the following manslaughter instructions tendered by the petitioner to the jury:

> "The defendant is charged with the crime of murder which includes the crime of voluntary manslaughter. The defendant has pleaded not guilty.
>
> (C.[1]53)
>
> ---
>
> A person commits the crime of voluntary manslaughter who kills an individual without lawful justification if, at the time of the killing, he acts under a sudden and intense passion resulting from serious provocation

---

1. "C" refers to the Common Law Record filed in the court below.

   "T" refers to the Transcript of the trial court proceedings.

by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(C.45)

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

FIRST: That the defendant performed the acts which caused the death of Esperansa Delarosa; and

SECOND: That when the defendant did so he acted under a sudden and intense passion resulting from serious provocation by Esperansa Delarosa.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

(C.47)

A person commits the crime of voluntary manslaughter who intentionally or knowingly kills another without lawful justification if, at the time of the killing, he believes that circumstances exist which should justify the killing, but his belief that such circumstances exist is unreasonable.

(C.51)

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

1. That the defendant, without lawful justification, intentionally or knowingly performed the acts which caused the death of Esperansa Delarosa; and

2. That when the defendant did so he believed that circumstances existed which would have justified killing Esperansa Delarosa; and

3. That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.
>
> (C.49)

In affirming the trial court's refusal to instruct the jury on voluntary manslaughter, the Illinois Appellate Court stated that the petitioner "presented no evidence that the shooting itself was the result of serious provocation." However, in determining whether there was sufficient evidence to warrant the giving of such an instruction, the trial court was required to look at the entire record, not only the evidence presented by the defense. The Illinois courts have long held that defendants are "entitled to have the jury instructed not only as to the law applicable to the state of facts testified to by them, but applicable to

any state of facts which the jury might legitimately find from the evidence to have been proven. A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony." People v. Scalisi, 324 Ill. 131, 145; 154 N.E. 715 (1926) (Emphasis Added)

It is also well settled that only the slightest amount of evidence need be shown to warrant the giving of such an instruction, People v. Sykes, 45 Ill. App.3d 674, 359 N.E.2d 897, 4 Ill. Dec. 64, 67 (1977); that in making the determination the court may not weigh the evidence, People v. Khamis, 411 Ill. 46, 103 N.E.2d 133, 136 (1951); and that even if the evidence is conflicting, and the accused's testimony is impeached, he may still be entitled to such an instruction,

People v. Boothe, 7 Ill. App.3d 401, 287 N.E.2d 289, 290 (1972).

In Boothe, the court said that the defendant's testimony that he was attacked by the deceased with a knife while they were fighting was sufficient to require giving of the tendered instruction on the lesser included offense of voluntary manslaughter.

In the case of People v. Boisvert, 27 Ill. App.3d 35, 325 N.E.2d 644 (1975), it was stated:

> "In our view the most satisfactory trial solution would be for the judge to liberally apply the rules respecting the giving of instructions on lesser included offenses when requested by a defendant so as to give them freely in cases where there is any evidence fairly tending to bear upon the issue of that offense even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. [Citations omitted.] Even in cases in which there is no direct testimony that could establish a lesser included offense but where the jury could fairly infer that

> the lesser offense had been committed the defendant should be given the benefit of the doubt and the instruction as to the lesser included offense should be given in respect for the jury's central role in our jurisprudence." (Emphasis Added)

The court below did correctly state that a voluntary manslaughter instruction must be given where there is some evidence of "conduct sufficient to excite an intense passion in a reasonable person" and that conduct includes "substantial physical injury or assault, mutual quarrel or combat."

In the case at bar, there was sufficient evidence, viewing the record in its entirety, of "substantial assault" and of "mutual quarrel" which required the trial court to instruct the jury relating to the lesser included offense of voluntary manslaughter.

Here, the petitioner testified that

the deceased told him that he would never see daylight again (T.289, 306) and that she pointed a gun at him (T.291, 311). This evidence definitely established the fact of a "substantial assault" inasmuch as the deceased, in effect, threatened the petitioner's life and had the means of carrying this threat into effect. The petitioner also testified that the two of them had been arguing immediately before the shooting (T.288, 318), and also that the deceased was pushing him around (T.305), threw a plate of food on the floor and threw a wine glass at him (T.289). Officer Miller corroborated the fact that a broken wine glass was found on the kitchen floor (T.246). This evidence satisfied the "mutual quarrel" conduct.

Officer Miller also testified when called as a rebuttal witness by the State

that after his arrest, the petitioner told him that the deceased attempted to take a gun out of the dresser in the living room, that he wrestled with her to obtain control of the gun and then shot her (T.363).

The referred to testimony of the petitioner, coupled with Officer Miller's testimony, was sufficient evidence to justify the trial judge giving a voluntary manslaughter instruction notwithstanding the petitioner's other testimony to the effect that the shooting was accidental and caused by his dog jumping on him.

The lower court's statement that the defense of accident is not compatible with the "sudden and intense passion resulting from serious provocation" (Page 9 of Slip Opinion) is erroneous. See People v. Boothe, (2nd District, 1972),

7 Ill. App.3d 401, 287 N.E.2d 289 and People v. Buchanan (4th District, 1980), 91 Ill. App.3d 13, 414 N.E.2d 262.

In Boothe, the court stated:

> "The fact that defendant relied on the defense of accidental death does not preclude him from raising the issue [voluntary manslaughter] since he is entitled to the benefit of any defense based on the evidence even if inconsistent with his own testimony." 287 N.E.2d at page 290 (Emphasis Added)

The opinion of the lower court is at variance with the opinion of this court in Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839, 843 (1896) which held that if there is any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all of the evidence whether the crime was murder or manslaughter. In Stevenson the accused's defense was self defense which would make

his actions non-criminal. However, this court stated that the fact that the evidence might raise an issue as to whether any crime at all was committed is not in the least inconsistent with the claim that it also raised an issue as to whether the accused was guilty of manslaughter instead of murder.

In the case of People v. Craven, 54 Ill.2d 419, 299 N.E.2d 1, the court held that the trial court erred in refusing to give voluntary manslaughter instructions even though the defendant testified that he did not shoot and kill the victim.

The petitioner also testified that when the victim pointed the gun at him, he believed his life to be in danger (T.292). He also said that when he saw the gun, he lost his mind (T.306). In People v. Harris, 8 Ill.2d 431, 134 N.E.2d 315, the court said that a voluntary manslaughter

instruction is warranted in the event the evidence consists of facts that an attempt was made by the deceased to inflict a personal injury on the defendant, and that the killing resulted from the violent passion before sufficient time had elapsed for the voice of reason to return.

Since the pointing of the gun at the petitioner by the deceased, her threat that he would never see daylight again and the shooting of the deceased by the petitioner all took place within a matter of minutes, the above referred to facts present in the case at bar certainly were sufficient to meet the test of the Harris case, and the jury, as the trier of fact, should have been permitted to determine whether the killing resulted from a sudden and intense passion before the petitioner's voice of reasoning had

returned.

Therefore, it is obvious from the foregoing, that the jury, had it been properly instructed, could have found that the killing was the result of the threats or provocation of the deceased that preceded the shooting.

Therefore, since there was ample evidence in the trial court record to entitle the petitioner to have the jury instructed on manslaughter, the trial judge's refusal to do so infected the entire trial to such an extent that the resulting conviction was so fundamentally unfair as to violate petitioner's due process rights pursuant to the Fifth Amendment.

In the case of People v. Papas, 381 Ill.90, 44 N.E.2d 896, the Illinois Supreme Court stated:

> "In a case tried by a jury, it is the province of the jury, not the judge, to

> decide the guilt or innocence of the accused. It is equally the province of the jury to decide whether or not the accused is guilty of murder, or of the lesser crime of manslaughter, if there is any evidence which tends to prove the lesser rather than the greater crime. We have repeatedly rejected instructions which, as a matter of law, took the decision of this question from the jury." 44 N.E.2d at page 898 (Citations omitted) (Emphasis Added)

It is also interesting to note that after the jurors had been deliberating for only a short time in the case at bar, they returned to the courtroom and through the foreman inquired, "Also some questions as to the findings of the jury as far as more -- charge other than the two indicated by the court." (T.466). The jury had been instructed only as to murder and armed violence (T.455-458). Obviously the jury was inquiring as to whether a verdict as to a lesser included

offense such as manslaughter could be returned.

Since the trial judge invaded the province of the jury by refusing to permit it to determine whether petitioner was guilty of the lesser crime of manslaughter, the petitioner's rights pursuant to the Sixth Amendment were violated.

As this court stated in the case of Morissete v. United States, 342 U.S. 246, 276; 72 S.Ct. 240, 256 (1952):

> "Had the jury convicted on proper instructions, it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges."

Since the trial judge did not properly instruct the jury in the case at bar, it is not "the end of the matter"; and the petitioner should be given the opportunity of being tried with a properly instructed jury.

II. The Unsupported Insinuations Referred To By The Prosecution During Cross Examination And Closing Argument Deprived Petitioner Of A Fair Trial.

During the cross-examination of the petitioner, the prosecutor asked numerous questions of an insinuating character without producing the proper evidence to support the insinuations.

Some examples of this improper cross-examination were the following:

> "Q [Assistant State's Attorney]: Did you say that it is a murder to the police?" (T.326)
>
> * * *
>
> "Q Do you recall a person asking you, to say you have to tell why, and you said it is a murder, 'There is a murder involved, and I just shot my wife'?
>
> MR. ROTENBERG: Objection. It is not proper impeachment.
>
> THE COURT: Overruled.
>
> MR. ROTENBERG: I move for a mistrial.
>
> THE WITNESS [Defendant]: I

told them person shot.

MR. KELLY: Q Did you tell them there was a murder involved?

A: I might have say. I don't know. I was so upset. I don't know what I was saying." (T.343-344)

In their closing arguments, the prosecutors also referred to the fact that the petitioner said he had committed murder when he called the police (T.412-413, 439). One of the prosecutors told the jury: "He admitted it when he said, 'There was a murder,' He has admitted it." (T.412-413). Later in closing argument, the other prosecutor again told the jury: "Why else would he have called the police and said that he committed a murder, that his wife was dead?" (T.439)

No evidence was offered by the State to show that the petitioner had, in fact,

told the police that there was a murder involved when he called the police to report the shooting.

Since the petitioner did not admit that he had told the police "there was a murder involved" nor did he admit that he told the police that he had committed a murder, it was improper for the State to insinuate that such statements had been made without producing the supporting evidence.

Also, during the cross-examination of the petitioner, the prosecutor asked the following question of him (T.354):

> "Q Sir, at the time your wife was shot, isn't it, in fact, true that you heard her call the police and say that you were beating on her, and that is the reason you shot her before the police arrived to answer that call?"

Although the trial judge sustained the petitioner's objection and instructed the jury to disregard the question (T.355),

the trial judge erroneously permitted the prosecution to argue that the victim had called the police because she had been beaten by the petitioner (T.416).

> "There is a reasonable inference that when she called 911 she wanted some help, and it is a reasonable inference that the reason that she wanted help is because she was beaten, and the only adult in that room--"
>
> "MR. ROTENBERG [Defense counsel]: Objection.
>
> "MR. FRANKS: -- Was the defendant."
>
> "THE COURT: Well, Mr. Franks may draw reasonable inference. Objection is overruled. Proceed."

Thus, even though there was no evidence of the substance of the victim's call to the police or any evidence of the petitioner having beaten the victim, the State was able to implant this into the minds of the jurors by way of raising an improper insinuation on cross-examination and improper closing argument.

In the case of People v. Sanders, 357 Ill. 610 (1934), the defendant was convicted of robbery of a bank while armed with a dangerous weapon. On cross-examination, the defendant Smith was asked whether he made a statement that he was in the alcohol business with the Shelton gang. Smith denied making the statement. In ruling that this cross-examination was improper, the Illinois Supreme Court stated at page 622:

> "The question was only proper as an impeachment question, and no effort was made to make the impeachment after laying the supposed foundation therefor. In that situation, the question should not have been asked. (People v. Florita, 319 Ill. 78)."

In People v. Shipp, 52 Ill. App.3d 470 367 N.E.2d 966, 10 Ill. Dec. 357 (1977), the court stated:

> "... While, under our view of this case, it is not necessary for us to explore this assertion, we note that it is highly improper for a prosecutor to raise an unsupported insinuation on cross-examination, as was done here where the prosecutor raised the serious matter of the defendant's shooting of Herman Shipp, but made no effort to introduce supporting evidence. (People v. Nuccio (1969), 43 Ill.2d 375, 253 N.E.2d 353). It seems highly probable that this improper cross-examination had a prejudicial effect upon the jury."

In People v. Nuccio, 43 Ill.2d 375, 253 N.E.2d 353 (1969), the court held that the defendant was denied a fair trial as a result of the State's cross-examination which included unsupported insinuations of misconduct on the part of the defendant and where the State failed to present appropriate rebuttal testimony to support such insinuations.

To the same effect, is the more recent case of People v. Morris, 79 Ill. App.3d

318, 398 N.E.2d 38, 34 Ill. Dec. 363 (1979) wherein the court stated:

> "Where the State in laying a foundation for impeachment insinuates the existence of prior inconsistent statements by the witness and the witness denies making the statement, the State must produce evidence that the prior inconsistent statement was made. [Citations omitted] If this were not true, a defendant would be subject to trial by insinuation and innuendo. In this case, the alleged prior inconsistent statement was the confession of Morris. We can think of no evidence more damaging than the defendant's own words of guilt. Consequently, to falsely state the existence of such a statement is to deny the defendant a fair trial and thus, plain error." 398 N.E.2d at page 47 (Emphasis Added)

Although the court below properly concluded that the prosecution improperly asked the petitioner on cross-examination whether he had told the police that there was a murder involved and also improperly argued to the jury that the petitioner said there was a murder and that he

committed a murder, the lower court was in error in also concluding that these improprieties did not warrant the reversal of the petitioner's conviction.

The improper questions and comments went to the very heart of the case, that is, whether the petitioner was guilty of the crime of murder. These questions and comments unfairly implanted in the minds of the jury the fact that the petitioner had admitted his guilt of the charged crime even though there was no evidence to sustain these unwarranted assertions. Improper assertions that an accused has admitted his guilt of the charged crime certainly deprives him of his right to a fair trial and should not be lightly brushed aside as being harmless error, especially in those cases, as here, where the proof of guilt is not overwhelming.

The lower court's comment that defense

counsel did not respond in his closing argument to the improper comment should not be considered by this court because a response would have only served the purpose of adding greater emphasis to the improper statement. The lower court's comment that defense counsel failed to object when the other prosecutor also improperly commented on these matters in his closing argument is also of no consequence because the trial judge certainly would have been consistent in his rulings and undoubtedly would have overruled his objection. This also would have served the purpose of emphasizing the importance of the prosecutor's improper comments in the minds of the jurors.

The lower court also stated that although it was error for the prosecutor to state in his closing argument that the victim had called the police because "she

was beaten," this error was also not prejudicial to the defendant.

Since the petitioner's theory throughout the trial was that the victim was the aggressor, the prosecutor's improper comment to the jury that the victim had called the police because she was beaten by the petitioner (T.416) was especially prejudicial to his defense because it wrongfully insinuated that he, rather than the victim, was at all times the aggressor. The court's comment, in overruling petitioner's objection, to the effect that the prosecutor's statement was a reasonable inference unduly enhanced the importance of this unwarranted inference, and also had the effect of telling the jury that there was a basis in the evidence for this statement.

The opinion of the lower court is in

conflict with decisions of this court as well as other federal reviewing courts. See Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629 (1935). In United States v. Brown, 519 F.2d 1368, 1370 (6th Cir. 1975), the court stated that "Laying such prejudicial allegations before a jury by dint of cross-examination without being prepared to prove them is generally regarded as reversible error."

Therefore, the petitioner's conviction should be reversed because the improper cross-examination and arguments to the jury were so prejudicial as to deprive the petitioner of the fair trial guaranteed him by the Due Process clause of the Fifth Amendment.

CONCLUSION

WHEREFORE, for the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

Respectfully submitted,

JEROME ROTENBERG
Attorney for Petitioner

APPENDIX

Second Division
April 7, 1981

80-101

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY
Plaintiff-Appellee,	)	
vs.	)	HONORABLE ROBERT J. COLLINS,
FRANK PURRAZZO,	)	PRESIDING.
Defendant-Appellant.	)	

Mr. JUSTICE PERLIN delivered the opinion of the court:

Defendant, Frank Purrazzo, was charged in an information with murder and armed violence. (Ill. Rev. Stat. 1977, ch.38, pars. 9-1(a), 33A-2.) Following a jury trial defendant was found guilty of both offenses and was sentenced to serve two concurrent terms of 20 years in the Department of Corrections. From those judgments defendant has appealed, presenting the following issues for review: (1) whether the trial court erred in refusing to instruct the jury on the issues of voluntary manslaughter and justified use of force; (2) whether the State's cross-examination of defendant was improper and prejudicial; (3) whether the State improperly argued facts not based upon the evidence to the jury; and (4) whether the State improperly attempted to impeach defendant through the use of his post-arrest silence. For the reasons hereinafter set forth, we affirm the judgments finding defendant guilty of

murder and armed violence.

Defendant's common law wife, Esperansa Delarosa, was shot to death on the evening of December 1, 1978. At approximately 10:30 P.M. on that evening Chicago Police Officers Thomas Czapiewski and Jerritt Yedlinski received a radio report of a woman shot at an apartment building located at 4415 North Lawndale. After the officers arrived, they entered the vestibule of the building and started to ring the doorbells. Czapiewski knocked at the door to the garden apartment. Defendant opened the door, Czapiewski identified himself as a police officer and asked, "What happened?" Defendant answered, "I just shot my wife." The officers entered the apartment and saw a woman, later identified as Esperansa Delarosa, sitting in a pool of blood on the couch in the living room. Talia Purrazzo, the three and one-half year old daughter of the victim and defendant, was also present. Officer Yedlinski immediately checked the woman's vital signs but could not detect a heartbeat. There was blood on her clothes and on the wall behind her as well as what appeared to be two bullet holes in the same wall. Yedlinski observed bullet wounds to the woman's upper thigh and torso.

Officer Czapiewski found a handgun on the floor in the living room a few feet from the couch. He also discovered two spent shells, one on a chair in the living room and one on the floor. Neither officer saw any marks, bruises or bloodstains on defendant.

Area 5 Homicide Investigator Michael Miller arrived at the apartment at about 11:30 p.m. He noticed the weapon on the floor approximately six feet from the couch. After the evidence technicians had processed the weapon, Miller inspected it and identified it as a Browning .380 semi-automatic pistol, which still contained two live rounds. He testified that a separate pull of the trigger would be necessary to fire each shot from the weapon. While he was at the scene Miller saw blood on the sofa underneath the victim by her right thigh, on the rear of the sofa behind her head and on the wall behind. There was no other blood in the apartment.

Miller recovered three expended cases in the apartment, one from a chair in the living room and two from the floor next to the sofa. The cases would have been ejected from the right side of the weapon as it was being fired. Miller also found some clothing and a broken wine glass on the floor of the kitchen.

Dr. Eupil Choi performed the autopsy on the body of the victim on December 2, 1978. In the course of his examination Dr. Choi observed entrance wounds to the right side of the head, the abdomen and the right side of the groin, and one exit wound on the left side of the head. Only the bullets fired into the victim's abdomen and groin were recovered. The abdominal entrance wound was approximately two inches above the navel. The bullet traveled in a "backward and mildly downward direction," pierced her intestines

and came to rest in her lower back on the left side. The bullet that entered the right side of her groin proceeded in a "mildly leftward and backward and upward direction" and lodged beneath the pelvic floor. The course of the bullet that passed through the victim's head was straight but "sharply leftward."

In Dr. Choi's opinion the victim died from bullet wounds to her head, abdomen and groin which penetrated her brain and intestines. He could not determine whether she was sitting or standing when she was shot. There were no contact wounds and the pathologist saw no signs of "strippling," i.e., powder burns which would have been evident had the pistol been fired at the victim within arm's length, approximately 12 inches.

Defendant took the stand in his own defense and testified that as of December 1, 1978, he had been living with the victim for five years and that she had given birth to his daughter, Talia. Defendant arrived home about 6:30 p.m. that evening. The victim, their baby daughter and their German Shepherd dog were present. Defendant and the victim went to the corner tavern and each consumed three small beers. Defendant walked back to the apartment by himself to prepare dinner.

Defendant said that when the victim came home 45 minutes later she was drunk. As they sat down to eat, the victim started arguing with defendant and pitched her paper plate onto the floor. When defendant asked her why she did that, the

victim threw a wine glass at him which missed defendant and hit the china closet behind him. She started pushing him around in the kitchen, and defendant ran and hid in the bathroom for a few minutes. After he came out, the victim rushed out of the kitchen to defendant and told him that he would never see daylight again. She then proceeded into the living room. Defendant picked up the baby and followed her into that room. According to defendant, the victim then approached him and pointed his gun at him. Worried about the baby who was still in his arms, and fearing that his life was in danger, defendant tried to disarm the victim. While he was struggling with her, the gun discharged accidentally and defendant pushed her onto the couch. The dog jumped at defendant, and the gun kept "going off." Defendant "dropped everything" and called the police.

Defendant testified that he did not intentionally shoot and kill the victim and denied that he intended to cause her death or great bodily harm.

On cross-examination defendant could not recall how many times he fired the gun. He did not believe that the first shot hit the victim. After the first shot he had the gun in his own hands. Defendant explained: "I had the gun, took it from her, dog jump on me like as he was jumping, thing went off, and I went goofy." The dog would not "bite us but he thought we hurt the baby." Defendant stated that he explained to the police the circumstances of what had happened.

He told them that the victim had argued with him and threw a wine glass at him, and that he had acted in self-defense. Defendant, however, never informed the police that the gun discharged accidentally because the dog had been jumping on his arm. He assumed that they knew.

Defendant did not recall telling the police that he was "deathly afraid" of the victim or that she had called the police and requested that a unit be sent to their apartment. Defendant denied informing the police that his wife attempted to remove the gun from the dresser. He also denied saying to the police that the gun had come from the dresser drawer, that he had the gun and was angry with the victim and shot her.

The State and defendant stipulated that a toxicologist found evidence of 113 milligrams of alcohol in the victim's blood. They also stipulated that the victim called the police at 10:23 p.m. on the evening of the shooting.

In rebuttal the State recalled investigator Miller who testified that he interviewed defendant at Area 5 Homicide about 1 a.m., December 2, 1978. Defendant was nervous, upset and crying. He was advised of his Miranda rights and said that he wanted to make a statement regarding the shooting of the victim. Defendant told the investigator that he had argued with his wife in the evening and that during the course of their argument his wife called the police and requested that a unit be sent to his apartment. According

to Miller, defendant also stated that after the victim called the police she threw a wine glass at him. The argument went from the kitchen into the living room where there was a dresser. Defendant said his wife had gone to the dresser and attempted to take a gun out of it. He wrestled with his wife to obtain control of the gun and then shot her.

At the conclusion of investigator Miller's testimony, both sides rested. The trial court refused defendant's proferred instructions on voluntary manslaughter and justified use of force because in the court's judgment defendant's theory at trial was that the shooting was an accident. The jury returned verdicts finding defendant guilty of murder and armed violence. The trial court sentenced defendant to serve 20 years in the Department of Corrections on each charge, the sentences to run concurrently.

I.

Defendant's first argument on appeal is that the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter and on the use of justified force. The People respond that the jury was properly instructed.

Section 9-2 of the Criminal Code states in pertinent part:

> "(a) A person who kills an individual without lawful justification commits voluntary manslaughter

if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, * * *.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code [ch. 38, par. 7-1], but his belief is unreasonable." Ill. Rev. Stat. 1977, ch. 38, par. 9-2.

Section 7-1 states:

"A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself * * *." Ill. Rev. Stat. 1977, ch. 38, par. 7-1.

Defendant contends that he presented evidence which required the trial court to submit to the jury his instructions setting forth the elements of the offense of voluntary manslaughter under both sections (a) and (b) of the statute. Defendant contends further that the jury should have been instructed in the defense of justifiable use of force. We cannot agree with either contention.

It is the settled rule in murder cases that if there is evidence in the record which, if believed by a jury would reduce the crime to manslaughter, a manslaughter instruction tendered by the defendant must be given. (People v. Simpson (1978), 74 Ill.2d 497, 500, 384 N.E. 2d 373; People v. Lockett (1980), 82 Ill. 2d 546, 550, 413 N.E.2d 378.) It is equally well settled, however, that such an instruction should not be given if the evidence clearly demonstrates that the crime was murder or nothing and there is no evidence to support a conviction of manslaughter. Simpson at 501; Lockett at 551; People v. Craven (1973), 54 Ill. 2d 419, 425, 299 N.E.2d 1.

Defendant also claims that his instruction on justifiable use of force should have been given. The supreme court has repeatedly held that "a defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony" (People v. Scalisi (1926), 324 Ill. 131, 145, 154 N.E.715; People v. Papas (1942), 381 Ill. 90, 96, 44 N.E.2d 896;

People v. Izzo (1958), 14 Ill.2d 203, 211, 151 N.E.2d 329) and that "very slight evidence upon a given theory of a case will justify the giving of an instruction." (People v. Khamis (1952), 411 Ill. 46, 53 103 N.E.2d 133; People v. Kalpak (1957), 10 Ill.2d 411, 425, 140 N.E.2d 726.) Nevertheless, the "very slight evidence" test does establish a minimal level beneath which instructions need not be given. "To hold otherwise would permit a defendant to demand unlimited instructions which are wholly unrelated to the case but are based upon the merest factual reference or witness's comment." (People v. Bratcher (1976), 63 Ill.2d 534, 540-541, 349 N.E.2d 31.) With these considerations in mind we turn to a review of the evidence which defendant cites in support of his argument that the jury should have been instructed on voluntary manslaughter and justified use of force.

Defendant testified that before the victim was shot, she argued with defendant, threw a wine glass at him, pushed him around in the kitchen, told defendant that he would never see daylight again and pointed a gun at him. Defendant testified further that when the victim pointed the gun at him he was in fear for his life. A voluntary manslaughter instruction under 9-2(a) is appropriate and must be given if tendered by the defendant where there is some evidence of "conduct sufficient to excite an intense passion in a reasonable person." Such conduct includes "substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the

offender's spouse, * * *." (S.H.A. chap. 38, par. 9-2, Committee Comments; People v. Crews (1967), 38 Ill.2d 331, 335, 237 N.E.2d 451.) A voluntary manslaughter instruction under 9-2(b) and a self-defense instruction under section 7-1 must be submitted where there is some evidence in the record which, if believed by a jury, would support a claim of self-defense. (People v. Lockett (1980), 82 Ill.2d 546, 551-553, 413 N.E.2d 378.) Defendant, however, presented no evidence that the shooting itself was the result of serious provocation or in the belief that he was acting in self-defense.

Defendant testified that the weapon discharged accidentally as he was trying to wrest control of it from his wife. After the first shot had been fired, defendant pushed the victim onto the living room couch. According to defendant his German Shepherd dog then jumped on his arm, making the gun fire several more times. Defendant's theory at trial was that the killing was inadvertent and unintentional. Defendant correctly states that where there is evidence in the record which, if believed by the jury, would reduce the crime to a lesser included offense, an instruction defining that offense should be given even though the theory of defense at trial is inconsistent with the possibility that the defendant is guilty of the lesser offense. (People v. Bembroy (1st Dist. 1972), 4 Ill. App. 3d 522, 525, 281 N.E.2d 389.) A defendant may rely on the totality of the evidence which appears in the record, regardless of its source. (People v. Simpson (4th

Dist. 1978), 57 Ill. App.3d 442, 446, 373 N.E.2d 809.) In the case at bar, however, defendant does not claim nor do we find that any of the evidence introduced by the State would support an instruction on voluntary manslaughter or justified use of force.

Defendant's account at trial of the various incidents of provocation and threats which preceded the killing of the victim provides no basis for an instruction on voluntary manslaughter or self-defense where defendant testified that the shooting itself was accidental. The defense of accident is not compatible with the "sudden and intense passion resulting from serious provocation" necessary under subsection 9-2(a) of the statute defining voluntary manslaughter. In reference to that subsection, our supreme court has observed that "[t]he offense of voluntary manslaughter has commonly been described as '[a]n intentional homicide committed in a sudden rage of passion engendered by adequate provocation, and not the result of malice conceived before the provocation * * *' (Perkins, The Law of Homicide, 36 J. Crim. L. & Criminology 391, 412 (1946).)" (People v. Leonard (1980), 83 Ill.2d 411, 420, ___ N.E.2d ___.) And subsection 9-2(b) of the statute applies to one who intentionally or knowingly kills another under an unreasonable belief that the killing is necessary in order to defend himself. If the belief is reasonable, then the defendant is exonerated from any criminal liability under the justifiable use of force provisions of section 7-1 of

the Criminal Code. It follows, therefore, that an instruction on voluntary manslaughter or justifiable use of force cannot be based solely upon the defendant's testimony where the defendant himself states that the killing was accidental.

By its very nature self-defense, whether reasonable or not, relates to the intentional or knowing use of force and not to an accidental shooting. If defendant acted in what he believed to be self-defense, he must have fired the weapon intentionally or knowingly. If the gun was accidentally discharged, all questions of self-defense are out of the case. People v. Dzambazovic (1st Dist. 1978), 61 Ill. App.3d 703, 717, 377 N.E.2d 1077.

Dzambazovic presents facts which, in some respects, are strikingly similar to those related by defendant. In that case the defendant testified that his girlfriend became hysterical during an argument while they were in his automobile. She pulled a gun from the glove compartment and threatened to shoot both the defendant and herself if he persisted in his intention to drive to the home of her new boyfriend. The defendant grabbed for the gun and a struggle ensued during which the woman was shot and killed. The court, as previously noted, held that the defendant's self-defense instruction was properly refused where his testimony, if believed, would indicate that the killing was accidental.

In People v. Tanthorey (1949), 404 Ill. 520, 530, 89 N.E.2d 403, cited in Dzambazovic, the supreme court stated that instructions on self-defense were correctly refused where the defendant testified that the killing was an accident, that he was not aware that he had fired the weapon or that he had shot the victim, and that it was not his intention or purpose to shoot him. The court, at page 531 of its opinion, also held that "[t]he defense of misadventure advanced by him in his testimony cannot be reconciled with the offense of manslaughter any more than it can be reconciled with the offense of murder. The two are incompatible and cannot emerge from one factual situation." As in Tanthorey, the defendant's testimony "contains no facts, assuming it to be true, upon which the giving of a manslaughter instruction could be rightfully predicated."

Defendant, however, calls our attention to the Second District's opinion in People v. Boothe (2nd Dist. 1972), 7 Ill. App.3d 401, 287 N.E.2d 289. In Boothe the defendant testified that the victim came after him with a knife. During the ensuing struggle, the victim slipped and impaled herself on the knife. Evidence was also presented that the victim had been involved in other incidents with knives and that this was known to the defendant. The court held that the defendant's testimony that he was attached by the victim with a knife while they were fightin was sufficient to require the trial court to submit defendant's tendered instruction on voluntary manslaughter: "The fact that

defendant relied on the defense of accidental death does not preclude him from raising the issue since he is entitled to the benefit of any defense based on the evidence even if inconsistent with his own testimony." Boothe at 403.

Somewhat similar language appears in the Fourth District's recent opinion in People v. Buchanan (4th Dist. 1980), 91 Ill. App.3d 13, 414 N.E.2d 262. There the trial court instructed the jury on voluntary manslaughter and self-defense but refused to allow the defendant to introduce evidence of the deceased's violent character. The defendant appealed arguing that such evidence should have been admitted. The appellate court agreed in spite of the defendant's testimony that "the shooting occurred during and as a result of the struggle and was in that sense accidental." The conviction was affirmed, however, where other evidence was introduced which brought to the attention of the jury the deceased's violent reputation.

Boothe and Buchanan seem to suggest that a voluntary manslaughter instruction must be given to the jury in any case where the defendant claims that the deceased threatened to attack him or seriously provoked him even though the defendant testifies that the actual killing was accidental and there is no other evidence of such threats or provocation. To the extent that these cases appear to support this proposition we do not believe that such a proposition is in accord with the law on voluntary manslaughter and

self-defense. Where, by defendant's own testimony, a killing is accidental, instructions on voluntary manslaughter and justifiable use of force should not be given unless there is some evidence from which the jury could find that the killing was the result of the threats or provocation that preceded it. In our opinion the trial court properly refused defendant's instructions on voluntary manslaughter and justifiable use of force.

II, III.

In his second argument defendant contends that the State's cross-examination of defendant was improper and prejudicial. In his third argument he maintains that the State improperly argued facts not based on the evidence to the jury. Since these issues are interrelated, we consider them together.

On direct examination defendant testified that he called the police immediately after the shooting. During cross-examination the prosecutor asked defendant, "Did you say that it is murder to the police?" Defense counsel objected to the question, and the jury was excused. The prosecutor informed the court that he had a tape of a telephone call purportedly made by defendant to the police in which defendant used the word "murder" to describe what had happened to his wife. Based on that representation the court overruled defendant's objection. The prosecutor expressed his intention to play the tape for defendant in front of the jury and then ask him whether that

was the call which he mentioned on direct examination. The court advised the prosecutor that there would be no need to play the tape in the event defendant admitted that he used the phrase attributed to him by the prosecutor. With this understanding the jury was recalled and defendant was asked,

> "Q. Do you recall a person asking you, to say you have to tell why, and you said it is a murder, 'There is a murder involved, and I just shot my wife?'
>
> Mr. Rotenberg: Objection. It is not proper impeachment.
>
> The Court: Overruled.
>
> Mr. Rotenberg: I move for mistrial.
>
> The Witness [Defendant]: I told them person shot.
>
> Mr. Kelly: Q. Did you tell them there was a murder involved?
>
> A. I might have say. I don't know. I was so upset. I don't know what I was saying."

No tape was introduced into evidence. In argument both prosecutors stated that defendant had admitted to murdering his wife when he told the police operator, "There was a murder." Defense counsel objected to the first such reference, stating that, "I don't think that he ever

said that in response to the question. He said that he must have said - -." The court overruled the objection and invited defense counsel to respond to it in his own argument. He did not do so and failed to object when the matter was again raised in the State's rebuttal argument.

Defendant contends that he did not admit telling the police that "there was a murder involved" or that he had committed a murder. As a consequence, the State improperly insinuated that such statements had been made without producing the supporting evidence and improperly argued them to the jury. The People respond that the cross-examination was proper. We do not agree with the People.

On cross-examination a witness may be impeached by statements or acts inconsistent or at variance with his trial testimony. When a witness neither directly admits nor denies the prior inconsistent statement or act, it is competent to prove the affirmative by way of impeachment so long as it pertains to a material issue in the case. (People v. Preston (1930), 341 Ill.407, 419, 173 N.E.383; People v. Bush (1963), 29 Ill.2d 367, 372, 194 N.E.2d 308.) Were it not for this rule, "the witness might, in every such case, exclude evidence of what he had said or done by answering that he did not remember." Ray v. Bell (1860), 24 Ill.2d 444, 451.

The question which these cases leave unanswered is whether proof of the

inconsistent statement must be presented if the witness claims not to remember the statement or gives an evasive or uncertain response. Although there is some authority to the contrary (see Vancil v. Fletcher (5th Dist. 1967), 90 Ill. App.2d 277, 284, 232 N.E.2d 789), the weight of authority requires the cross-examiner to prove that the prior statement was made. (See Goldstein v. Hertz Corp. (1st Dist. 1973), 16 Ill. App.3d 89, 97, 305 N.E.2d 617; Schoolfield v. Witkowski (1st Dist. 1964), 54 Ill. App.2d 111, 125, 203 N.E.2d 460; Sellers v. Hendrickson (3rd Dist. 1977), 46 Ill. App.3d 549, 554, 360 N.E.2d 1235.) We enunciated this principle in Crespo v. John Hancock Mutual Life Ins. Co. (1st Dist. 1976), 41 Ill. App.3d 506, 520, 354 N.E.2d 381: "Extrinsic evidence, either oral or documentary, need not be introduced if the witness unequivocally admits making the out of court statement, but if the witness denies or fails to recall making the prior statement, then it is incumbent upon the examining party to offer evidence of that statement. [Citations omitted.]" (Accord, Rigor v. Howard Liquors (1st Dist. 1973), 10 Ill. App.3d 1004, 1009-1010, 295 N.E.2d 491.) The same principle applies to criminal prosecutions. (People v. Saunders (1st Dist. 1971), 132 Ill. App.3d 421, 425, 270 N.E.2d 217; People v. Williams (1st Dist. 1969), 105 Ill. App.2d 25, 34, 245 N.E.2d 17.) Accordingly we conclude that it was error for the State not to introduce proof of defendant's alleged statement to the police that "there is a murder involved." We do not, however, find that this error requires granting defendant a new trial.

A failure to follow through with proof of a prior inconsistent statement is not always reversible error. (Saunders; Williams.) Even in the absence of proof of an admission, a prosecutor's reference to an admission by the defendant does not require reversal where there is positive evidence of guilt. (People v. Allen (1959), 17 Ill.3d 55, 63, 160 N.E.2d 818; People v. Cain (1st Dist. 1979), 70 Ill. App.3d 1, 7, 388 N.E.2d 54.) We have recently considered a similar question in People v. Wilson (1st Dist. 1981), 92 Ill. App.3d 370, 415 N.E.2d 1315, where the prosecutor attributed the statement, "I killed him," to the defendant when there was no evidence whatsoever that that particular admission had been made. Although we condemned that remark as a grossly improper misstatement, we affirmed the defendant's conviction because of the strong evidence for her guilt. The remarks in the instant case fall far short of the error condemned in Wilson. In light of the evidence of defendant's guilt which we have set forth previously in this opinion, we are unable to conclude that the complained of questions and comments represented a material factor in the convictions or that the verdicts would have been different had they not been made. People v. Barnett (1st Dist. 1975), 34 Ill. App.3d 174, 178-179, 340 N.E.2d 116.

Defendant has also objected to the prosecutor's questions to defendant regarding whether he told the police he was "angry" with his wife. Defendant denied that he had ever said that. Investigator

Miller testified in rebuttal, however, that defendant said that he had "argued" with his wife. Although defendant did not use the word "angry," we find no prejudice in this comment.

Defendant was asked on cross-examination whether, when he called the police, he informed them that he lived on the fourth floor of the apartment building and not on the ground floor. Defendant denied this and the State introduced no evidence to controvert that denial. No objection was made to the question when it was asked, however, and defense counsel brought out on redirect examination the fact that the names "Frank Delarosa" and "Esperansa Delarosa" appeared on the door to their apartment and on their mailbox. Officer Czapiewski previously testified that when he and his partner responded to the message of a woman shot at 4415 North Lawndale, he had a name, presumably that of the victim's. It is apparent, therefore, that defendant was not prejudiced by the prosecutor's question.

Defendant complains of the following question asked on cross-examination:

> "Q. Sir, at the time your wife was shot, isn't it in fact true that you heard her call the police and say that you were beating on her, and that is the reason you shot her before the police arrived to answer that call?
>
> A. No."

The trial judge sustained defendant's objection to the question and instructed the jury to disregard it. Normally this prompt action by the court will correct the error. (People v. Carlson (1980), 79 Ill.2d 564, 577, 404 N.E.2d 233.) The prosecutor, however, returned to this theme in closing argument when he said that the victim had called the police because "she was beaten." Defendant's objection to this remark was overruled. We must express our disapproval of the State's comment where no evidence was introduced that defendant had been beating his wife. The comment was not based on the evidence, and we cannot concur with the State that this was "reasonably inferred from the testimony" that she had called the emergency police number. We do not, however, believe that this error requires reversal of defendant's convictions.

There is a distinction to be made between condemnation of errors because of the manner and intent with which they were made and a finding that those errors could in fact have prejudiced defendant's right to a fair trial. (People v. Whitley (1st Dist. 1977), 49 Ill. App.3d 493, 505, 364 N.E.2d 511.) The possibility of prejudice to defendant was minimized by the uncontroverted testimony of the pathologist that he observed no bruises or discoloration on the victim's arms or hands. This testimony tended to negate any inference the prosecutor sought to create that the victim had been beaten. Upon our review of the evidence we do not find that the error could have

influenced the jury's verdicts.

Finally, defendant objects to the prosecutor's attempt to cross-examine defendant on the basis of the pathologist's testimony regarding the path of the bullets fired into the victim's thigh and navel. Defendant correctly points out that the prosecutor misstated Dr. Choi's testimony. The bullet that entered the victim's thigh proceeded in a "mildly leftward and backward and upward direction," not, as the prosecutor said, in a "downward direction." The bullet that entered her navel traveled in a "backward and mildly downward direction," not "straight in" as the prosecutor suggested. Defendant cites People v. Graves (1st Dist. 1978), 61 Ill. App.3d 732, 378 N.E.2d 293, in support of the proposition that this line of questioning was improper.

The error in Graves was that the pathologist did not describe the course of the bullets and the defendant did not recall his testimony. In the case at bar the course of the bullets was known to the jury, and defendant did acknowledge hearing the pathologist's testimony. Moreover, defense counsel objected to this questioning in Graves which counsel failed to do here. The improper cross-examination in Graves was only one of a multitude of errors in cross-examination, improper exclusion of evidence and erroneous jury instructions which led to the reversal of the defendant's conviction. We do not have the same errors in the record before us. The prosecutor's misstatement

of Dr. Choi's testimony regarding the path of the bullets did not, in our opinion, cause defendant to experience any substantial prejudice.

IV.

Defendant's fourth argument on appeal is that the prosecutor improperly used defendant's post-arrest silence in an effort to impeach defendant's explanation at trial as to how the victim met her death. Defendant testified that the victim was killed accidentally when their dog jumped on defendant's arm causing his gun to discharge three times. At several points in cross-examination the assistant state's attorney asked defendant whether he had related this account to the police following his arrest. Defendant admitted that he did not. In argument the prosecutor characterized defendant's trial testimony as a "different story" from the statements he made to the police. Defendant contends that this cross-examination and comment requires reversal of his convictions because it constituted an impermissible reference to his post-arrest silence in violation of Doyle v. Ohio (1976), 426 U.S. 610. We do not agree.

In Doyle the Supreme Court held that it is fundamentally unfair and a deprivation of due process for the prosecution to attempt to impeach a defendant who offers an exculpatory story at trial with his failure to offer that statement to the police following his arrest. Our own supreme court has extended this rule to circumstances where there is no evidence

that the defendant was previously given his Miranda warnings. People v. Beller (1979), 74 Ill.2d 514, 521, 386 N.E.2d 857.

There are, however, two situations in which the prosecution may comment on post-arrest silence. If the defendant who offers an exculpatory version of events at trial claims falsely to have told the police the same version upon arrest, he may be impeached with evidence that he did not in fact do so. (Doyle footnote 11, pages 620-621). And if defendant's exculpatory statement at trial is manifestly inconsistent with statements he made after his arrest, comment or questioning about his failure to give the same statement at the time of arrest is not improper in the context of eliciting that contradiction. (Anderson v. Charles (1980), ___U.S.___, 100 S.Ct. 2180; Beller at 524-525; People v. Rehbein (1979), 74 Ill.2d 435, 442-443, 386 N.E. 2d 39.) In determining whether the prosecution has impermissibly commented on the defendant's post-arrest silence, the cross-examination must be considered in its entirety. Anderson at 2182.

Applying the foregoing principles to the facts in the case at bar we find that the cross-examination and argument on defendant's failure to tell the police the story that he related at trial falls within the second exception. Defendant testified that he told the police "the circumstances [that] happened," and that he had shot his wife in self-defense. Defendant never informed the police that

the victim had been killed accidentally when their dog jumped on defendant's arm, causing his weapon to discharge. His explanation at trial was obviously inconsistent with his post-arrest statements to the police. In our judgment it was not improper for the prosecutor, in the course of bringing these inconsistencies to the attention of the jury, to question and comment upon defendant's failure to mention his trial explanation to the police following his arrest. (See In re S.L.C. (1st Dist. 1979), 75 Ill. App.3d 473, 394 N.E.2d 687.) The authorities on which defendant relies, People v. Robinson (1st Dist. 1976), 44 Ill. App.3d 447, 358 N.E.2d 43, and People v. Foster (1st Dist. 1980), 81 Ill. App.3d 915, 401 N.E.2d 1221, are distinguishable because in neither case was there a direct contradiction or obvious inconsistency between the defendant's post-arrest statement and his exculpatory trial account.

For the foregoing reasons we affirm the judgments of the circuit court of Cook County.

Affirmed.

Hartman, PJ., and Stamos, J., concur.

STATE OF ILLINOIS
THE OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD, 62706

October 19, 1981

Mr. Jerome Rotenberg
Attorney at Law
7 S. Dearborn Street
Chicago, Ill. 60603

In re: People of the State of Illinois, respondent vs. Frank Purrazzo, petitioner - No. 55076

Dear Mr. Rotenberg:

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court

Opposition

Office - Supreme Court, U.S.
FILED
JAN 21 1982
ALEXANDER L. STEVAS,

No. 81-1211

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANK PURAZZO,
PETITIONER,

vs.

THE STATE OF ILLINOIS,
RESPONDENT.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Appellate Court properly upheld the trial court's refusal of petitioner's tendered jury instructions on the issue of voluntary manslaughter where there is no evidence in the record to support such instructions and where petitioner's sole theory of defense was that the killing was accidental.

2. Whether any improper question or remark by prosecution counsel was harmless error where the properly admitted evidence of petitioner's guilt was so overwhelming that the jury's verdict would not have differed.

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No. 81-1211

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANK PURAZZO,
PETITIONER,

vs.

THE STATE OF ILLINOIS,
RESPONDENT.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Appellate Court, First District, affirming petitioner's convictions for murder and armed violence, is reported as *People v. Frank Purazzo*, 95 Ill. App. 3d 886, 420 N.E.2d 461 (1st Dist. 1981).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for a Writ of Certiorari. However, as treated more fully within the following argument, the respondent does not believe that petitioner has shown any good reason for this Court to exercise its sound judicial discretion to grant the petition.

STATEMENT OF THE CASE

After a state jury trial in the Circuit Court of Cook County, Illinois, the petitioner, Frank Purazzo, was convicted of murder and armed violence and sentenced to serve two concurrent terms of 20 years in the Illinois State Penitentiary. (R. 473; R. C106)[1] Petitioner appealed from the judgments of conviction and the sentences to the Appellate Court of Illinois, First District. The Appellate Court affirmed petitioner's convictions and sentences. His petition for rehearing to the Appellate Court was denied. His petition for leave to appeal to the Supreme Court of Illinois was also denied.

The Petitioner's Trial

The prosecution's trial evidence established that at approximately 10:30 p.m. on December 1, 1978, Chicago Police Officers Thomas Czapiewski and Jerritt Yedlinski received a radio report of woman shot at an apartment building located at 4415 North Lawndale Street, in Chicago. (R. 148) After the officers arrived, they entered the vestibule and began to ring doorbells. (R. 164) Officer Czapiewski knocked at the door to the garden apartment. (R. 150) A man later identified as petitioner opened the door. Officer Czapiewski identified himself as a police officer and asked petitioner, "what happened?" (R. 150, 166) Petitioner answered "I just shot my wife." (R. 151) Petitioner then led the officers into his apartment. (R. 167) At that time, the officers saw a woman, later identified as Esperansa Delarosa, sitting in a pool of blood on the living-room couch. (R. 211) Officer Yedlinski immediate-

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[1] "R." designates the transcript of record of petitioner's trial'; "R.C" designates the common law record.

ly checked her vital signs but could not detect a heartbeat. (R. 207-208) There was blood on her clothes and on the wall behind her. (R. 157, 212) Two bullet holes were in the wall. (R. 212) Upon further inspection, Officer Czapiewski found a handgun lying on the floor of the living room. (R. 154-155) He also discovered two empty shell casings, one on a chair and one on the floor. (R. 160-161)

The officers then placed petitioner under arrest, advised him of his *Miranda* rights, and transported him to the police station. (R. 216) During this period neither officer saw any marks, bruises, or bloodstains on petitioner. (R. 152, 216-217)

Michael Miller, a homicide investigator for the Chicago Police Department, arrived at the apartment at about 11:30 p.m. on the night of the shooting. (R. 226) He found a gun 6 feet away from where the victim was situated on the couch. (R. 229) Investigator Miller examined the weapon, a Browning .380 semi-automatic pistol, and found that it still contained two live rounds. (R. 230) From his police and military training Investigator Miller was aware that a separate pull of the trigger would be necessary to fire each shot from the weapon. (R. 231)

Upon further inspection of the room, Investigator Miller observed blood underneath the victim's right thigh, on the seat of the sofa behind her head, and also on the wall behind her. (R. 231) He also recovered three expended shell casings in the apartment, one from a chair in the living room and two from the floor next to the sofa. (R. 231) Finally, he found some clothing and a broken wine glass on the floor of the kitchen. (R. 247-248)

On December 2, 1978, Dr. Eupil Choi, a forensic pathologist, performed the autopsy on the victim's body. (R. 182) In the course of his examination Dr. Choi discovered that the

victim had been shot in the head, the abdomen, and the groin. (R. 183) None of the three wounds the victim suffered were "contact bullet" wounds. (R. 191) A "contact bullet wound" occurs when there is no gap in distance between the gun muzzle and the surface of the target which it actually struck. (R. 191) Dr. Choi also saw no signs of stippling, i.e. powder burns which would have been evident had the pistol been fired at the victim from extremely close range. (R. 193-194) Based upon his examination of the victim, Dr. Choi had an opinion to a reasonable degree of medical certainty that the victim died from bullet wounds to her head, abdomen, and groin, which penetrated her brain and intestines. (R. 191)

After the prosecution rested, petitioner testified on his own behalf. He testified that as of December 1, 1978, he was living with the victim and their 3½ year old daughter. (R. 285) Petitioner arrived home at about 6:30 p.m. that evening. The victim, their daughter, and their German Shepherd dog were present. (R. 285) Shortly thereafter, the victim and petitioner went to a nearby tavern and each consumed three small beers. (R. 286) Petitioner then walked back to the apartment by himself to prepare dinner. (R. 287)

Petitioner further testified that the victim returned to the apartment about 45 minutes later. (R. 287) Petitioner thought she was drunk. (R. 288) As they sat down to eat, the victim began arguing with petitioner and threw a paper plate onto the floor. (R. 288-289) When petitioner asked the victim why she had done that, the victim threw a wine glass at him. (R. 289) Petitioner then ran and hid in the bathroom for a few minutes. (R. 289) Petitioner testified that after he came out, the victim rushed out of the kitchen toward him and told him that he would never see daylight again. (R. 289-290) She then proceeded into the living room. Petitioner picked up the baby, who was in the kitchen, and followed the victim into the

living room. (R. 290) At this point, according to petitioner, the victim came at him with a gun. (R. 290) Petitioner tried to take the gun away from the victim and the gun discharged accidentally. (R. 291) Petitioner finally wrestled the gun away from the victim and pushed her onto the couch. (R. 291-292) Petitioner testified that after he pushed the victim onto the couch, the dog began jumping on his arm causing the gun to discharge. (R. 291-292) Petitioner further testified that he did not intentionally shoot and kill the victim and denied that he intended to cause her death or great bodily harm. (R. 292)

On cross-examination, petitioner could not recall how many times he fired the gun. (R. 317) Petitioner explained how the dog caused him to fire the gun as follows: "I had the gun, took it from her, dog jump on me like as he was jumping, thing went off, and I went goofy." (R. 317) Petitioner admitted that he never told the police that his jumping dog had caused him to fire the gun. (R. 321) He assumed they knew. (R. 321) However, defendant did tell the police that the victim had argued with him and threw a wine glass at him, and that he had acted in self-defense. (R. 321-323)

The prosecution and petitioner stipulated to a toxicologist's report that the victim had 113 milligrams of alcohol in her system at the time of her death. (R. 357) The parties also stipulated that the victim had called the police at 10:23 p.m. on the evening of the shooting. (R. 359)

In rebuttal, the prosecution recalled Investigator Miller, who testified that he interviewed petitioner at the police station at about 1:00 a.m., on December 2, 1978. (R. 368) After explaining to petitioner his *Miranda* rights, the officer asked petitioner if he wanted to make a statement. The investigator testified that petitioner told him that he had argued with the victim, and she had called the police requesting that a squad car be sent to her apartment. (R. 362-363) Petitioner also told the investigator that after the victim called the police, she

threw a wine glass at him. (R. 363) The argument went from the kitchen into the living room where there was a dresser. (R. 363) Petitioner said his wife had gone to the dresser and attempted to take a gun out of it. (R. 363) He wrestled with his wife to obtain control of the gun and then shot her. (R. 363)

At the conclusion of Investigator Miller's testimony, both sides rested. The court refused petitioner's proferred instructions on voluntary manslaughter and justified use of force because in the court's judgment, petitioner's theory at trial was that the shooting was an accident. (R. 389-392) Thereafter, the jury found petitioner guilty of murder and armed violence and judgment was entered thereon. (R. 473) The trial court sentenced petitioner to serve 20 years in the Illinois State Penitentiary. (R. C106) Petitioner appealed from his convictions and sentences to the Appellate Court of Illinois.

The Petitioner's Appeal

The Appellate Court of Illinois, First District, affirmed petitioner's convictions and sentences in an opinion dated April 7, 1981. (The Opinion is set out in full in the petition for writ of certiorari, Appendix "A".) The Appellate Court ruled, *inter alia*, that the trial court properly refused to instruct the jury on the lesser included offense of voluntary manslaughter and on the use of justified force. (Appendix "A" at 7-16) In so holding, the Appellate Court noted that there was no evidence from which the jury could find that the killing was the result of the threats or provocation that preceeded it. (Appendix "A" at 16) The Court also noted that since petitioner's only theory was that the killing was accidental, the trial court properly refused his instructions on voluntary manslaughter and justified use of force. (Appendix "A" at 16)

The Appellate Court also addressed petitioner's claim that certain alleged insinuations by the prosecutors during cross-

examination of petitioner and during closing argument deprived him of a fair trial. (Appendix "A" at 16-24) The Appellate Court concluded that the petitioner was not prejudiced by any question or remark by the prosecutor and further, that any impropriety was harmless beyond a reasonable doubt given the positive evidence of petitioner's guilt. (R. Appendix "A" at 16-24)

Following the affirmance of his convictions by the Appellate Court, petitioner filed a petition for rehearing in the Appellate Court. On May 12, 1981, the Appellate Court denied the petition, without comment. Petitioner then sought leave to appeal to the Supreme Court of Illinois. On October 19, 1981, the Illinois Supreme Court denied without comment his petition for leave to appeal. (Appendix "A" at 27) It is from the decision of the Illinois Supreme Court that petitioner brings the petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE ILLINOIS APPELLATE COURT PROPERLY UPHELD THE TRIAL COURT'S REFUSAL OF PETITIONER'S TENDERED JURY INSTRUCTIONS ON THE ISSUE OF VOLUNTARY MANSLAUGHTER WHERE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT SUCH INSTRUCTIONS AND WHERE PETITIONER'S SOLE THEORY OF DEFENSE WAS THAT THE KILLING WAS ACCIDENTAL. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI.

Petitioner requests that a Writ of Certiorari be granted by this Court on the ground that the trial court erred in refusing

his tendered jury instructions on the issue of voluntary manslaughter. He argues that there was "sufficient evidence" presented at his murder trial to justify such instructions. The respondent strongly maintains that a writ of certiorari is improperly sought upon this basis.

In essence, petitioner is asking this Court to review a lengthy trial record to see if this Court can find what the trial court and the Illinois Appellate Court could not find: any evidence sufficient to justify instructions on voluntary manslaughter. This Court has repeatedly held, "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925).

A review by this Court would involve only questions of evidence applied under familiar legal rules. It is well-settled that if there is evidence in the record which, if believed by a jury, would reduce the crime of murder to manslaughter, a manslaughter instruction tendered by defendant must be given. *Stevenson v. United States*, 162 U.S. 313, 314, 16 S.Ct. 839, 40 L.Ed. 980 (1896); *People v. Simpson*, 74 Ill. 2d 497, 500, 384 N.E.2d 373, 374 (1978). It is equally well-settled, however, that such an instruction should not be given if the evidence clearly demonstrates that the crime was murder or nothing and there is no evidence to support a conviction of manslaughter. *Davis v. United States*, 165 U.S. 373, 379, 17 S.Ct. 360 (1897); *People v. Simpson, supra*, 74 Ill. 2d at 501, 384 N.E.2d at 374. Furthermore, although a defendant is entitled to any defense shown by the entire evidence (*People v. Scalisi*, 324 Ill. 131, 145, 154 N.E. 715 (1926)), it is axiomatic that where the only evidence relating to a theory of defense is that a killing was the result of an accident or misadventure, an instruction involving manslaughter is completely inappropriate. *People v. Tanthorey*, 404 Ill. 520, 530, 89 N.E.2d 403 (1949). As stated by the Illinois Supreme Court in *Tanthorey*:

"[t]he defense by misadventure . . . cannot be reconciled with the offense of manslaughter any more than it can be reconciled with the offense of murder. The two are incompatible and cannot emerge from one factual situation." *Id.* at 531.

Given the well-defined nature of the law applicable to manslaughter instructions, it is manifestly apparent that a grant of certiorari in the instant case would not enable this Court to confront a pure issue of constitutional law or to resolve a conflict among the state courts or federal circuit courts of appeal; rather, it would only force this Court to embark on a detailed exploration of the trial record for the simple purpose of resolving whether the Illinois Appellate Court considered all the evidence. "[T]here are no exceptional circumstances of any kind that would justify" this Court in rejecting the findings of the Illinois Appellate Court, for those findings are clearly supported by the overwhelming weight of the evidence. *Fry Roofing v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 97 L.Ed. 168 (1952). Accordingly, petitioner has failed to show the need for this Court, in its sound descretion, to grant his petition. Nevertheless, the respondent, confident that the Illinois Appellate Court has properly determined the issue, will briefly address the merits.

The Illinois Criminal Code defines voluntary manslaughter as follows:

> (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed,***.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
>
> (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the

> time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code (ch. 38, par. 7-1), but his belief is unreasonable. Ill. Rev. Stat. 1977, ch. 38, par. 9-2.

Section 7-1 of the Criminal Code states:

> A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself ***." Ill. Rev. Stat. 1977, ch. 38, par. 7-1.

Instructions substantially comporting with the cited statutory language were among those submitted by petitioner. (R. C41-C51) However, as found by both the trial court and appellate court, no evidence was presented at trial to warrant the giving of such instructions.

Petitioner's sole theory of defense at trial was that the killing was inadvertent and unintentional. (R. 317) By petitioner's own admission he did not intentionally fire the fatal shots while under a "sudden and intense passion resulting from serious provocation" or while under a belief that the killing was necessary to defend himself; rather, petitioner expressly testified that he fired the fatal shots inadvertently, when his German Shepard dog allegedly jumped on his arm while he was holding the gun. (R. 317)

Furthermore, the evidence introduced by the People at trial clearly was not such as would warrant the giving of petitioner's manslaughter instructions. The evidence adduced by the People revealed that the victim died from bullet wounds to her head, abdomen, and groin which penetrated her brains

and intestines. (R. 191) Dr. Choi, the pathologist who examined the victim, testified that the wounds were not contact wounds, nor did he observe any "stippling," i.e. powder burns which would have been evident had the gun been fired at the victim at extremely close range. (R. 191-194) In addition, the only evidence of blood found in the apartment was located on or immediately beneath the victim. (R. 157-158) The arresting officers saw no marks, bruises, or bloodstains on petitioner. (R. 152, 216-217) Finally, the only weapon recovered in the apartment was the one found on the rug 6 feet in front of the victim. (R. 155, 229) These facts, considered in their totality, conclusively establish that the victim did not die during or as the result of a bloody struggle with petitioner for control of the gun. Rather, they establish that petitioner shot an unarmed victim from a distance of several feet. If petitioner's own testimony that the shooting was accidental is also considered, it is manifestly apparent that there is no basis in the record for suggesting that petitioner shot the victim in self-defense or as the result of serious provocation. Hence, the trial court properly refused petitioner's instructions.

Contrary to petitioner's assertion, his statement to Investigator Miller and his account at trial of various incidents of provocation and threats which preceeded the killing of the victim provide no basis for an instruction on voluntary manslaughter, under either a theory of imperfect self-defense or sudden and intense passion. Petitioner testified that before the victim was shot, she argued with petitioner. However, it is well-established that mere words are never sufficient provocation to establish voluntary manslaughter. *Allen v. United States*, 164 U.S. 492, 494, 17 S.Ct. 154, 155 (1897); *People v. Simpson*, 74 Ill. 2d 497, 501, 384 N.E.2d 373, 375 (1978). Petitioner further related that prior to the shooting, the victim threw a wine glass at him, pushed him around in the kitchen, told petitioner he would never see daylight again,

pointed a gun at him, and wrestled with him for control of the weapon. (R. 288-292, 363) In arguing that this testimony justified a manslaughter instruction, it is clear that petitioner has completely ignored the evidence relating to his state of mind at the most crucial time, i.e. the time of the shooting.

Petitioner testifed that immediately prior to the shooting, he had disarmed the victim, pushed her onto the living room couch, and gained control of the gun. (R. 316-317) It was while the victim sat alone and defenseless on the couch that petitioner shot her three times. Therefore, at the time of the shooting, it is inconceivable that petitioner could have reasonably feared death or great bodily harm so as to warrant a manslaughter instruction based on imperfect self-defense. Ill. Rev. Stat. 1977, ch. 38, sec. 9-2(b). A person is not justified in shooting or employing a deadly weapon against his antagonist after the latter has been disarmed or disabled. e.g., *People v. Limas*, 45 Ill. App. 3d 643, 359, N.E.2d 1194, 1201 (2nd Dist. 1977). Furthermore, as detailed above, since petitioner testified that he fired the fatal shots by *accident*, it is evident that none of the incidents leading up to the shooting were of such a seriously provocative nature to cause petitioner to *intentionally* fire the gun out of a "sudden and intense passion." (Ill. Rev. Stat. 1977, ch. 38, sec. 9-2(a)) or out of an unreasonable belief that the killing was necessary to defend himself.

The cases cited by petitioner in support of his position are distinguishable both on their facts and on the law. Petitioner relies heavily on *People v. Boisvert*. 27 Ill. App. 3d 35, 325 N.E.2d 644 (2d Dist. 1975) for its dictum that courts should be liberal in giving instructions on lesser included offenses. However, the *Boisvert* court nonetheless affirmed defendant's murder conviction, finding no evidence to support a manslaughter instruction. The other cases cited by petitioner are similarly distinguishable. In the instant case there simply was

no evidence presented by either side to suggest that petitioner intentionally shot the victim out of a sudden and intense passion or in self-defense. Petitioner shot the unarmed victim as she sat alone on the couch. There is nothing in the record to suggest that the incidents leading up to the shooting so provoked petitioner that he fired the gun out of an irresistable impulse; indeed, petitioner's sole theory at trial was to blame his dog for causing the gun to fire accidentally. There was no testimony of an exchange of blows between the victim and the petitioner, there was no evidence that the victim severely beat petitioner, nor was there any testimony whatsoever that the victim posed a deadly threat to petitioner at the time she was fatally shot. Therefore, any claim that his conduct fell within the ambit of the Illinois voluntary manslaughter statute is completely without merit.

In summary, petitioner has failed to show any need for this Court, in its sound discretion, to grant his petition. In essence, petitioner is asking this court to review evidence under familiar and well-settled legal rules. There are no exceptional circumstances of any kind which would warrant this court in rejecting the findings of the Illinois Appellate Court. Therefore, the petition for a writ of certiorari should be denied.

II.

ANY QUESTION OR REMARK BY PROSECUTION COUNSEL WAS TOTALLY HARMLESS WHERE PROPERLY ADMITTED EVIDENCE ESTABLISHED PETITIONER'S GUILT OF MURDER BEYOND ANY REASONABLE DOUBT. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI.

Petitioner further seeks a grant of a writ of certiorari on the ground that certain questions posed by prosecution counsel

during cross-examination and certain remarks by prosecution counsel during closing argument deprived him of a fair trial. The respondent maintains that a writ of certiorari is improperly sought upon this basis.

Initially, the respondent notes that petitioner has failed to show that the Illinois Appellate Court has decided the issue in a way that conflicts with applicable decisions of this Court. *See* Supreme Court Rule 17(1)(c). Although petitioner cites *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629 (1935) and *United States v. Brown*, 519 F.2d 1368 (6th Cir. 1975) for the proposition that suggestions or insinuations by prosecution counsel which are unsupported by the evidence are improper, those cases do not hold that such improper remarks warrant reversal of an accused's conviction where the evidence of his guilt is overwhelming. Indeed, the reverse is true. In *Berger*, this Court explicitly recognized that where the evidence of an accused's guilt is overwhelming or where the misconduct of the prosecuting attorney was slight, an accused's conviction may properly stand. 295 U.S. at 89, 55 S.Ct. at 633; *see also*, F.R.C.P. 52(a). In the instant case the Illinois Appellate Court did not repudiate the *Berger* doctrine. Rather, based upon a thorough and comprehensive review of the record, it found that the remarks by the prosecutors did not warrant reversal since the evidence of petitioner's guilt was overwhelming. Such a finding was fully consistent with *Berger*, *Brown*, and the great weight of applicable authority. *See also*, *People v. Baptist*, 76 Ill. 2d 19, 29, 389 N.E.2d 1200, 1204-1205 (1979); *People v. Allen*, 17 Ill. 2d 55, 63, 160 N.E.2d 818 (1959).

In effect, then, petitioner is asking this Court to review questions of evidence applied under a familiar legal rule. As in Argument I, *supra*, petitioner is not asking this Court to confront a pure issue of federal or constitutional law or to resolve a conflict among the circuits or states; rather, he

merely is asking this court to review a lengthy trial record to see if the Illinois Appellate Court properly applied the harmless error rule to the facts of his case. Clearly, "[T]here are no exceptional circumstances of any kind that would justify" this Court, in rejecting the findings of the Illinois Appellate Court, for those findings are clearly supported by the evidence. *Fry Roofing v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 97 L.Ed. 168 (1952). Accordingly, petitioner has failed to show the need for this Court, in its sound discretion, to grant his petition. Nevertheless, the respondent, confident that the Illinois Appellate Court has properly determined the issue, will briefly address the merits.

Petitioner claims that the prosecutors improperly insinuated through their questions and comments that he admitted to the police that a murder had occurred. He further argues that the prosecutors improperly suggested through their questions and comments that petitioner had beaten the victim prior to the killing. The respondent maintains that the questions and remarks at issue were proper as being within the bounds of permissible cross-examination and closing argument. Nevertheless, assuming, *arguendo*, that any or all of the cited remarks were improper, the Illinois Appellate Court properly found that any error was harmless beyond a reasonable doubt.

As detailed in Argument I, the People's evidence established that petitioner shot the victim from a distance of several feet as the victim sat alone and unarmed on her living room couch. When the officers arrived at the scene of the homocide, they observed no marks, bruises, or blood stains on petitioner; the only evidence of blood in the apartment was located on or beneath the victim. Further, the fatal wounds were not contact wounds nor could the pathologist find any evidence of powder burns. Such evidence constitutes persuasive proof that the victim did not die as a result of a bloody struggle for control of the gun.

Petitioner admitted shooting the victim but claimed that the gun discharged accidentally when his German Shepherd dog jumped on his arm. Petitioner's claim of misadventure is inherently incredible. Investigator Miller, who recovered the murder weapon, testified that a separate pull of the trigger would be necessary to fire each of the three fatal shots fired from the weapon. (R. 231) Further, petitioner admitted at trial that at the time of the shooting he had his child in one hand, and he acknowledged that his dog would never harm them. (R. 317) Finally, in making his post-arrest statement to the police, petitioner made no mention of the dog and simply stated that he had wrestled with the victim for control of the gun before shooting her. (R. 321, 363) Such facts belie petitioner's claim that his dog accidentally caused him to shoot the victim.

In brief, then, the record conclusively demonstrates that petitioner intentionally shot the victim at point blank range as she sat alone and unarmed on the living room couch. Given such positive evidence of guilt, the jury had an ample basis, irrespective of the remarks in question, from which to find petitioner guilty. Indeed, they could not conscientiously have arrived at any other verdict. Thus, as found by the Illinois Appellate Court, any improper question or remark by prosecution counsel was totally harmless.

The cases cited by petitioner in support of his position are distinguishable both on their facts and on the law. In *People v. Sanders*, 357 Ill. 610, 192 N.E. 697 (1934), the Illinois Supreme Court, although finding that the prosecutor erred in asking the defendant a certain question on cross-examination, expressly held that such error alone did not warrant reversal in light of the other evidence in the record. *Id.* at 622. Furthermore, in *People v. Nuccio*, 43 Ill. 2d 373, 253 N.E.2d 353 (1969), the Illinois Supreme Court detailed pages of numerous "prejudicial and unsupported insinuations" which

were patently contrary to fairness. 43 Ill. 2d 383-392. In the instant case, however, petitioner claims error with respect to only a few isolated questions and remarks. Certainly, any errors by the prosecution in the case at bar do not approach the frequency or intensity of those exhibited in *Nuccio*. Further, with respect to the prosecutor's comments regarding petitioner's alleged beating of the victim prior to the killing, the possibility of prejudice to petitioner was minimized by the uncontroverted testimony of the pathologist that he observed no bruises or discoloration on the victim's hands or arms.

Petitioner's reliance on *People v. Shipp*, 52 Ill. App. 3d 470, 367 N.E.2d 966 (2d Dist. 1977) and *People v. Morris*, 79 Ill. App. 3d 318, 398 N.E.2d 38 (1st Dist. 1979) is similarly unfounded. In *Shipp*, the decisive issue was whether the People had proven beyond a reasonable doubt that defendant had not acted in self-defense. As an issue it then found unnecessary to explore, the *Shipp* Court remarked that the prosecutor should not have asked defendant if she had murdered the decedent's brother 11 years ago. In the instant case the prosecutor never resorted to the blatantly prejudicial ploy used in *Shipp* of asking defendant if he had committed any heinous, unrelated acts in the remote past. *Morris*, is also distinguishable, where that defendant was cross-examined as to his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). The People submit that the present case is readily distinguishable from *Morris*, as the instant defendant never maintained post-arrest silence so as to even enable a *Doyle* situation to arise.

In summary, petitioner has failed to show any need for this court, in its sound discretion, to grant his petition for a writ of certiorari. Petitioner is merely asking this court to review the evidence under the well-settled harmless error rule. However, the Illinois Appellate Court has already reviewed the record in the instant case and found that the remarks and questions at

issue did not prejudice petitioner's right to a fair trial. The findings of the Appellate Court are fully supported by the evidence. Accordingly, since petitioner has failed to state any circumstances that would justify a grant of certiorari, his petition should be denied.

CONCLUSION

For all of the foregoing stated reasons, the People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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